Supreme Court, U.S.
FILED
SEP 13 2006
OFFICE OF THE CLERK

No. 06-370

IN THE

Supreme Court of the United States

JESSIE DORADO, INDIVIDUALLY AND AS MOTHER and NEXT FRIEND OF BRIANA ALEXIS MIRANDA, A MINOR and ON BEHALF OF THE ESTATE OF EDUARDO MIRANDA A/K/A EDUARDO MIRANDA DUARTE, DECEASED,

Petitioners,

v.

THE COUNTY OF EL PASO, TEXAS,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Texas, Eighth District, El Paso

PETITION FOR WRIT OF CERTIORARI

JACK GREENBERG
Counsel of Record
COLUMBIA UNIVERSITY
SCHOOL OF LAW
435 W. 116th Street
New York, NY 10027
(212) 854-8030

JAMES SCHERR
JEFFREY S. ALLEY
Counsel for Petitioner

JOSIAH GREENBERG
ROY B. OSER
Of Counsel

QUESTIONS PRESENTED

A Mexican physician, arrested in Texas on a charge of failure to appear for a traffic charge, died in jail three days later not having received his seizure medication. Defendant County, pursuant to statutory authority, had contracted with the jail medical director to "set specific protocols, policies and procedures concerning ... prescription medicines." The jury found that his deliberate indifference caused decedent's death, adjudicating the County liable under 42 USC § 1983. The Texas Court of Appeals, professing to employ the conventional, deferential standard of appellate review of the verdict, nevertheless reviewed the record *de novo* and reversed, concluding that the jail doctor had not acted with deliberate indifference and only the sheriff, not the doctor, could be a policy maker. It entered a take-nothing judgment n.o.v. against the deceased doctor's family.

(1) Did the Texas Court of Appeals flout the purpose of 42 USC §1983 and nullify its effect by ignoring this Court's well established principle that there can be more than one "policy maker" and that "policy making" can be delegated, thereby providing a formula for municipalities to escape liability for unconstitutional acts?

(2) Is there anything in federal law that permits the Texas Court of Appeals to burden the civil rights protected by 42 US §1983 by reversing, after *de novo* (rather than deferential) review of the jury verdict that decedent had died as a result of "deliberate indifference" when the court below does not employ *de novo* review in comparable cases, and by any standard its conclusion is egregiously wrong.

PARTIES TO THE PROCEEDING

The parties are named in the caption to the case.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

CITATATION OF OFFICIAL REPORTS BELOW 1

DATES JUDGMENTS OR ORDERS SOUGHT TO BE REVIEWED WERE ENTERED 1

THE STATUTORY PROVISION CONFERRING JURISDICTION ON THIS COURT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE 2

STATEMENT OF THE CASE 3

CHRONOLOGY OF DR. MIRANDA'S THREE DAYS AT THE JAIL 4

Friday 4

Saturday 5

Dr. Miranda's Final 26 Hours 6

THE COURT OF APPEALS MISCHARACTERIZATION OF THE RECORD 7

DR. BLOCK AS POLICY MAKER 8

DELIBERATE INDIFFERENCE 12

THE JURY VERDICT 13

HOW THE FEDERAL QUESTIONS WERE RAISED AND PASSED UPON IN THE COURTS BELOW 14

TABLE OF CONTENTS (CONTINUED)

Page

THE SUPREME COURT OF TEXAS DENIED REVIEW 16

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT 17

THE DECISION BELOW CONFLICTS WITH DECISIONS OF COURTS OF APPEALS ON WHAT CONSTITUTES "FINAL" POLICY MAKING 21

THE OPINION BELOW CONFLICTS WITH DECISIONS OF UNITED STATES COURTS OF APPEALS ON "DELIBERATE INDIFFERENCE" 24

CONSTITUTIONAL FACTS 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES:

Bennett v. City of Slidell, 728 F2d 762 (5th Cir.1984) 20

Board of the County Commissioners of Bryan County, Oklahoma v. Brown, 520 U.S. 397 (1997) 17

City of Keller v. Wilson, 534 US 1001 (2001) 15, 17, 22

City of St. Louis v. Praprotnik, 485 US 112 (1988) 11, 18, 20, 21

Cooper v. Dyke, 814 F.2d 941 (4th Cir. 1987) 24

Dice v. Akron, Canton & Youngstown R. R.,342 US 359 (1952) 23

Duncan v. Duckworth, 644 F. 2d 653 (7th Cir. 1981) 25

Felder v. Casey, 487 US 131 (1988) 23

Fielder v. Bosshard, 590 F.2d 105, 108 (5th Cir. 1979) 27

Howlett v. Rose, 496 US 356 (1990) 23

Hyland v. Wonder, 117 F.3d 405 (9th Cir.), amended, 127 F.3d 1135 (9th Cir. 1997), *cert. denied*, 522 US 1148 (1998) 21, 22

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 US 557 (1995) 29

Jett v. Dallas Independent School District, 491 US 701 (1989) 19

Jett v. Peterson, 439 F.3d 1091 (3d Cir. 2006) 25

Mandel v. Doe, 888 F.2d 783 (11th Cir. 1989) 25

Table of Authorities (continued)

Page(s)

Miller v. Fenton, 474 US 104 (1985) 29

Miranda v. Munoz, 770 F.2d 255 (436 F. 3d 560 (5th Cir. 2006) 25

Monell v.Department of Social Services, 436 US 658 (1978) 9, 19, 20

New York Times v. Sullivan, 376 US 254 (1964) 29

Norris v. Alabama, 294 US 587 (1935) 28

Plemmons v. County of Pulaski, 439 F.3d 818 (8th Cir. 2006) 25

Putnam v. Town of Saugus, 365 F. Supp. 2d 151 (D. Mass 2005) 22

Republic Pictures Corp. v. Kappler, 327 U.S. 757 (1946) 23

Worsham v. City of Pasadena, 881 F.2d 1336, (5th Cir. 1989) 21

STATE CASES:

County of El Paso v. Dorado, 180 S.W.2d 854 (Tex. App.-El Paso 2005), *reh'g denied*, 2006 Tex. App. Lexis 508 (Tex. App.-El Paso, Jan. 11 2006) 1, 24

Dorado v. County of El Paso, 2006 Tex. Lexis 447 (Tex. May 5, 2006) 1, 3, 16

FEDERAL CONSTITUTION AND STATUTES:

United States Constitution
Fourteenth Amendment 2, 14, 15, 16, 17

42 USC § 1983 ..... 2, 3, 14, 16, 17, 28

Table of Authorities (continued)

Page(s)

STATE AND LOCAL STATUTES, ATTORNEY GENERAL OPINION:

Tex. Loc. Gov. Code Ann. §351.001 (Vernon 1999) 10

Op. Tex. Att'y Gen. No. DM-111 10

MISCELLANEOUS:

Chemerinsky, Federal Jurisdiction, § 8.5.2at 497 (4th Ed. 2003) 22

CITATION OF OFFICIAL REPORTS BELOW

County of El Paso v. Dorado, 180 S.W. 3d 854 (Tex. App. El Paso 2005) COURT OF APPEALS OF TEXAS, EIGHTH DISTRICT, EL PASO *Rehearing denied* by *County of El Paso v. Dorado*, 2006 Tex. App. LEXIS 508 (Tex. App. El Paso, Jan. 11, 2006)Petition for review denied by *Dorado v. County of El Paso*, 2006 Tex. LEXIS 447 (Tex., May 5, 2006) Motion for rehearing on petition for review denied by *Dorado v. County of El Paso*, 2006 Tex. LEXIS 579 (Tex., June 23, 2006) Appeal from the 120th District Court of El Paso County, Texas. (TC # 97-2506). *County of El Paso v. Dorado*, 2005 Tex. App. LEXIS 7683 (Tex. App. El Paso, Sept. 15, 2005) (this opinion was withdrawn and 180 S.W. 3d 854 substituted)

DATES JUDGMENTS OR ORDERS SOUGHT TO BE REVIEWED WERE ENTERED

The order sought to be reviewed was entered December 1, 2005.

The petition for review by the Supreme Court of Texas was denied May 5, 2005.

The motion for rehearing on petition for review was denied June 23, 2006.

THE STATUTORY PROVISION CONFERRING JURISDICTION ON THIS COURT

28 USC §1257.

a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the

Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

U. S. Constitution Fourteenth Amendment

> Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 USC § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory

relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Thursday evening, February 27, 1997 El Paso police arrested and jailed Eduardo Miranda, a Mexican physician and surgeon, age 33, for failure to appear on a two year old DWI charge (14–109) [1] and a "bad plate."(11- 51)[2] . He legally resided in El Paso, Texas with his wife and daughter, but practiced in Juarez, Mexico. He did not speak English (15 – 156). He spoke only Spanish.

He died in the County jail about 74 hours later, Sunday night, or early Monday morning. His widow, Jessie Dorado and daughter Brianna sued El Paso County in state court for violation of Dr. Miranda's constitutional rights under 42 USC §1983. They alleged that the County had caused Dr. Miranda's death by, with deliberate indifference, failing to giv him his medication to control a seizure disorder.

Following a jury verdict, the court entered judgment for plaintiffs. The Texas intermediate Court of Appeals reversed.[3] The Texas Supreme Court denied review.[4]

---

[1]Citations to the record set forth volume number of the record, followed by page number.

[2]The arrest was 11:30PM Thursday; Dr. Miranda was taken to the jail 9AM next morning. (14–123)

[3]*County of El Paso v. Dorado*, 180 SW3d 854 (Tex. App.)

[4]*Dorado v. County of El Paso*, 2006 Tex. Lexis 447 (Tex. May 5, 2006).

CHRONOLOGY OF DR. MIRANDA'S THREE DAYS AT THE JAIL

Friday

Friday morning, jail personnel booked Dr. Miranda. A jailer, one Arvizu, asked him questions, and wrote his answers on a form in English (11- 274). The evidence was unclear as to whether Mr. Arvizu spoke Spanish (witness never heard him speak Spanish 13-68, see also 14-103), but suggests he did not. Captain Hernandez, a jail officer, testified that when a medical condition appeared at intake someone from the medical department would be called to complete the interview. (16–104). So did Dr. Block, the jail medical director (10-248). But no one from the medical department completed the interview. When booked, Dr. Miranda informed authorities that he suffered from convulsions, which Dr. Block also referred to as "grand mal seizures" (10-136)[5] :

Dr. Block testified:

> A.... It's documented on the chart. First of all when he came in they put – that he put – they put "convulsions" on his face sheet there. Then he was interviewed by one of our LVNs, who then called me up and we put him on the seizure medication. Yes, we knew he was a seizure patient. (10 – 127).

Persons with seizure disorders require medication to prevent seizures, which several witnesses agreed is a dangerous condition (15-176-177, 14-168). Dr. Miranda took a

---

[5]Further evidence to the same effect is at 13–55: Witness Nurse Dominguez, who searched personal belongings that decedent had with him at booking: "I found that he had lorazepam (the generic name for Ativan), which is Atavin, in his personal belongings. Then I contacted his wife just to double check that he did have a prescription for Ativan and the wife told me that he was taking Ativan."

medication, Ativan which he had with him with him when arrested, but it was confiscated. Dr. Block testified:

> Q: "Well, very clearly, Doctor Miranda had the medication with him [when he was first booked at the jail]."
>
> (Dr. Block): I certainly – that s my understanding." (10 – 135)

Dr. Miranda asked for medication all day Friday (10 – 139)[6] . But that day he received no medication (10-139, 12-84-85).

Saturday

Mrs. Dorado spoke to her husband Saturday morning. He was feeling worse and still had been asking for his medication, but no one would listen to him (12-84-85). She visited him Saturday afternoon. He appeared "really sick." At the front desk at the jail she was told that nothing could be done other than send a note to the jail clinic. (12- 86-87). Miranda called his wife every half hour Saturday night and sounded desperate (12-89).

Saturday evening Dr. Miranda saw a staff licensed vocational nurse (LVN), Juan Carlos Dominguez, who took an extensive history around 9:30 PM (13–52). Dominguez was also a medical student in Juarez, who had dropped out after two years when United States' funding for his school ceased.[7] Dr. Miranda told Dominguez that he was taking up to eight

---

[6]Testimony of Dr. Block: ...on Friday, obviously, there was no medication given to him; correct?

A. No, no medication was given to him.

[7]Of Dominguez the medical director said: "His work was more thorough than that of the average RN or LVN because of his being a medical student." (10-220).

milligrams of Ativan, near the high end of ten milligrams permissible daily dosage (13-54). Of that amount he took two milligrams at night. Dr. Miranda's widow testified he told her it had been prescribed for sleeplessness when his mother died, by a Dr. Martin Rodriguez in Juarez in 1991 (13–60).[5] A Juarez doctor, Navarette, in 1996 told him that he had "to slowly get off Ativan." (15–176). Any abrupt stop could bring on strong seizures. (15–177). Nurse Dominguez also knew that sudden withdrawal could have serious consequences. He believed, as Dr. Navarette did, that Dr. Miranda might well have a strong seizure if the medication were stopped abruptly. The County medical examiner testified to the same effect. (14-168)

Dominguez was alarmed at Dr. Miranda's condition on Saturday night. He called Dr. Block (10-142). He described the seriousness of the situation and said that Block needed to see Miranda (13-56). Block told him to give Miranda the two milligram nightly dose (13-61-62) and that he would see Miranda Sunday morning. (10-149). Block did not come in Sunday morning. Nor did he call to inquire after Miranda. Miranda did not receive Ativan Sunday.

Dr. Miranda's final 26 hours

During Dr. Miranda's final 26 hours, the jail authorities unequivocally knew everything about Dr. Miranda that would have enabled them to save his life: his illness, his medication, his usual dosage, the consequences of withholding it. They had a full day in which they might have given medical attention before he died.

Miranda called his wife Sunday morning, saying he was still feeling bad (12-92). Sunday morning she posted bond but

---

[5]Juarez, Mexico is a city of several million persons adjacent to El Paso, Texas and just across the Rio Grande River.

he could not be released for eight hours because of red tape (11-292, 294). She tried to drop off more Ativan, as did the bail bondsman, but was refused.

A nurse who dispensed medicine Sunday evening by calling out prisoners' names had a two milligram dose for Dr. Miranda but for "reasons not reflected in the record,"[9] he did not respond. The jail policy was to call a name twice and if there was no response to move on. No one checked as to why Dr. Miranda did not answer. Later, around 11PM that evening, an officer while looking for jail trustees, saw Miranda on the floor convulsing and called for help (14-21). The officers described him as incoherent, confused, disoriented and combative (9-79, 9-131; 14- 89, 90). Jail personnel handcuffed and shackled him and transported him on a gurney to the clinic.

A nurse called Dr. Block who directed that she administer Ativan and Haldol. She administered an injection of what she said was Ativan. Dr. Miranda died instantaneously (10-35). The syringe and vial of medication were not preserved (10-18, 39).

THE COURT OF APPEALS MISCHARACTERIZATION OF THE RECORD

The Court of Appeals wrongly repeated assertions that Dr. Miranda concealed his medical condition: "There is no constitutional requirement that municipalities provide jailers and law enforcement personnel with sophisticated medical training so that they will detect hidden medical problems." 180 SW3d at 864. "The individual bears the responsibility for informing the jail personnel about his or her medical condition in a truthful manner." Id. at 864. "Dr. Miranda failed to identify the nature of his medical condition in a truthful

---

[9] 180 SW3d at 867

manner." Id. at 865. "The fact that the effects of his dependency did not manifest themselves until several hours after he had been taken into custody does not give rise to an action against the County." Id. at 865. "Dr, Miranda, however, did not accurately describe his medical condition...." Id. at 867. All the foregoing statements to the effect that Dr. Miranda did not disclose that he suffered from seizures or convulsions are erroneous. The Court of Appeals opinion itself recites: "At the time of his booking, Dr. Miranda informed jail personnel he had a history of convulsions." 180 SW3d 854, 860. The jail medical director testified to this effect without contradiction (10-127).

Dr. Miranda had Ativan with him when he was booked. Dr. Block knew it. Dr. Miranda asked repeatedly for Ativan on Friday, Saturday and Sunday. His wife brought Ativan with her to the jail, as did a bail-bondsman, but Dr. Miranda was not permitted to receive it. He told Nurse Dominguez he took five or six milligrams of Ativan during the day and two milligrams at night. Yet the Court of Appeals opinion repeatedly says that Dr. Miranda "did not inform ... [jail personnel] that he was under medication for [convulsions]." Id. at 860. "... pre-trial detainee who is not forthcoming about his or her need for, or dependence upon, medication." Id. at 864. "... did not accurately describe his medical condition nor his need for or dependence upon medication." Id. at 867.[10] But the record is

---

[10]The Court of Appeals opinion, unaccountably, contains multiple personal attacks on Dr. Miranda, which on the record are unwarranted: Perhaps most astonishing and damaging is the charge that his seizure resulted from *"self induced abuse of medication."* 180 SW3d at 865. There is nothing whatsoever in the record to support this allegation, yet it colors all of the opinion. "He did not inform ...under medication.... other false statements ... during ... booking.... ...unemployed.... incorrect address." 180 SW 3d at 860. The booking form was in English. Address and employment were irrelevant to any issue in this case. But. counsel

clear, and certainly the jury had adequate basis for believing, that Dr. Miranda informed jail personnel of his need for medication and what it was. It would have been contrary to his interest to do anything else. Any allegation of concealment is contradicted by Dr. Miranda's many requests for medication. The jury might have concluded that incomplete information on the form was a consequence of its being in English, while Dr. Miranda spoke no English (15–156).

Both sides introduced evidence, some of it conflicting, on the cause of death. The Court of Appeals decision does not rest on considerations related to cause of death. Petitioner, therefore, will not discuss it.

DR. BLOCK AS POLICY MAKER

Because under this Court's decision in *Monell*[11] that the County could not be responsible for the conduct of its employees under the theory of respondeat superior, plaintiffs had to show that whomever caused Dr. Miranda's death was a "policy maker" for the County. Plaintiffs introduced a contract between Dr. Harold Block, the jail doctor and the County (10-75), signed by a judge of the Commissioner's Court for the County, entered into pursuant to statute, that designated Block as "policy" maker for jail medical care and medication, with

---

suggested it was his aunt's address entered in process of moving. As to employment, it was likely a function of inability to understand English. Court of Appeals: "Dr. Miranda told Nurse Juan Carlos Dominguez that he was under physician's orders to take two milligrams of Ativan each night.... also untruthful. [W]as self prescribing a much higher dose." Id. at 860. Nurse Dominguez testified Miranda told him he was taking two milligrams of Ativan at night and five or six milligrams during the day. He was speaking to Dominguez at night. There is no evidence that Miranda self-prescribed. He had seen several physicians in Mexico re Ativan (13-60, 15-176).

[11]436 US 658 (1978)

power to override custodial considerations. The sheriff approved the contract. The Medical Director and the County entered into the contract pursuant to Tex. Loc. Gov. Code Ann. §351.001 (Vernon 1999) which provides that the Commissioner's Court of each county is responsible to provide "safe and suitable jails for the county." The Commissioner's Court is authorized to select a medical provider to provide that care. Op. Tex. Att'y Gen. No. DM-111.

Dr. Block was responsible for the performance of the medical staff. He reported to the Sheriff, but neither the contract nor evidence indicated anything more than that he should "report" or even what that meant. The contract recited that the Medical Director "shall also provide and set specific protocols, policies and procedures concerning" (italics added) an exceedingly extensive list of potential inmate-patient needs. Particularly pertinent to this case were "2. Prescription medicines," "11. Detoxification," "13. Policy concerning medical administration," "F. training all persons administering medications in the FACILITY." The Medical Director's supremacy was assured by a provision which stated: "In situations requiring emergency medical care, custody procedures shall yield to the medical needs of the inmates as determined by the MEDICAL DIRECTOR (upper case in original)." The contract required him to "provide and set specific protocols, policies and procedures" with regard to central aspects of health care at the jail, to "approve and supervise all medical projects," and numerous other areas of responsibility. Much of this contract language is recited in the decision in the Texas Court of Appeals. Dorado, 180 S.W.3d at 871.

At the foot of the contract there is a line for the sheriff's signature below "Approved As to Content."

But, the Court of Appeals held that the County could not be liable for Dr. Block's conduct, because only the sheriff was the policy maker for the jail. While at one point in its opinion it acknowledged the possibility, it did not recognize that at the jail there could be more than one policy maker or that the sheriff could delegate. It did not address the plain language that confided major policy responsibility to the medical director. Petitioners submit that it is well established that there can be more than one policy maker.[12] Even if the sheriff were in some sense a policy maker for medical services at the jail, Dr. Block was without doubt a major policy maker because of the duties he undertook pursuant to the contract as well as powers delegated to him by the sheriff who approved the contract with the County.

Dr. Block, had been a pathologist, basically running a laboratory (10-86) from 1971 to 1995, not involved with patients at all, when he went to work at the jail (10-85). He worked at the jail Monday to Friday, from 7AM to 3 or 4PM (10-88). At the same time he operated a laboratory; he also was in the real estate business with his wife (10-87), who did most of that work. He handled the volume of patients by, among other things, taking 15 to 20 telephone calls at home at all hours, from Licensed Vocational Nurses (LVNs) who were on duty at the jail and dispensing advice through them (10-93). It was illegal for LVNs to assess patients. He took no notes of the conversations, remarking, "We don't charge for phone calls like lawyers do." (10-147). He was obligated to provide a replacement to perform medical services at his own expense when he was unavailable (10-79), which he declined to do because he would then be working as a "volunteer" (10-97).

---

[12] *City of St. Louis v. Praprotnik*, 485 US 112 at 126.

While his contract provided that he train personnel, he provided no training with regard to seizures or convulsions (10-102, 105, 108), although these occur about one per week in the inmate population (9-87, 10-98).

A staff nurse testified that Dr. Block referred to inmates as "scumbags" and "burdens" on society (13-72); that he would examine as many as twenty at a time, lined up nude (13-72, 16-150); and that he would not refer inmates to other health facilities, even emergency rooms, and withheld prescriptions as an economy measure (13-73).

Although, after Dr. Block had been informed of the seriousness of Dr. Miranda's situation Saturday night, and had promised to examine him Sunday morning, when he was in extremis, he never did. Nor did Dr. Block call in or inquire about Dr. Miranda (10-156). After Dr. Miranda died Dr. Block never made inquiry about the cause of death (10-176). It is difficult to imagine a higher degree of indifference.

His indifference extended to the trial proceedings, when he made a bizarre statement to plaintiff's counsel who had directed him to material on a video monitor, causing the Court to admonish him.

> "The Court: Dr. Block, Dr. Block... this is a court of law... It's an extremely serious case. A man has lost his life."[13]

DELIBERATE INDIFFERENCE

El Paso County would be liable for Dr. Miranda's death under §1983 if it were a consequence of a policy maker's subjective "deliberate indifference." The jury decided that it was. In coming to this conclusion it had plenty of evidence.

---

[13]Dr, Block had said to counsel: "Excuse me. You're so handsome, I just can't keep my eyes off you," He later apologized. (10-261)

But, the Court of Appeals decided that it wasn't. It first recited the conventional standard of appellate review observed in Texas and perhaps everywhere else: "In reviewing a 'no evidence' challenge, the appellate court considers only the evidence and reasonable inferences therefrom that tend to support the jury findings, disregarding all contrary evidence and inferences. (citation omitted). If there is any evidence of probative force to support the jury's findings, however, a motion for j.n.o.v. must be denied. (citation omitted)."[14]

Contrary to this articulated standard, the Court of Appeals then in fact reviewed the record de novo, unprecedented in Texas law as well as in §1983 cases. It resolved such minor uncertainties in evidence as there were, rejected uncontradicted evidence, and employed what might best be described as a defense of contributory fault or contributory negligence. It relied on evidence that the jury rejected and tendentiously weighed such factors as its assessment of decedent's character without, of course, having seen or heard a single witness. It entered judgment n.o.v. against petitioner.

Petitioner submits that this aberrational standard of review discriminated against petitioners' constitutional rights and placed a burden on their exercise in violation of the due process clause of the Constitution.

THE JURY VERDICT

The Court put questions to the jury. Following is the key question in this case and the jury's response:

> Question One: "Did any employee or official of the Defendant EL PASO COUNTY deprive Dr. Eduardo Miranda of his constitutional right to receive adequate medical care while confined as a pretrial detainee at

---

[14] *Dorado*, 180 S.W.3d at 861

> the El Paso County jail with deliberate indifference to his serious medical needs, which resulted from a policy, custom or practice adopted or maintained by the Defendant EL PASO County with deliberate indifference to Dr. Eduardo Miranda's constitutional rights that had a direct causal link to the occurrence in question?" (italics supplied).

The jury answered "YES" (20- 38-40)

HOW THE FEDERAL QUESTIONS WERE RAISED AND PASSED UPON IN THE COURTS BELOW

Plaintiffs' complaint claimed that defendants had denied to Dr. Miranda rights guaranteed by the Fourteenth Amendment to the Constitution of the United States and by 42 USC §1983. The jury verdict found that defendant County had denied him those rights.

The Texas Court of Appeals reversed. 180 S.W.3d 854. Its holding may be encapsulated in the following passages: "Furthermore, Appellees present little evidence that suggests that Dr. Harold Block was the policymaker for the El Paso County Detention Facility. Appellees had the burden of establishing that the policymaker was other than the Sheriff for the County of El Paso and they failed to meet that burden. We agree that Texas state law provides that the Sheriff of each county is the keeper of the county jail and recognize that the Sheriff is the policymaker for the jail." 180 S.W.3d at 870.

"Appellees' allegations address the nature and timing of the treatment Dr. Miranda received, rather than any failure on the part of the County to provide medical care. According to Appellees' allegations, the medical staff of the EPCDF may have been negligent in their treatment of Dr . Miranda but Appellees fail to state a claim against any person for deliberate indifference to his serious medical needs." 180 S.W.3d 868.

The Court of Appeals denied rehearing. 2006 Tex. App. Lexis 508 (Tex. App. El Paso, Jan. 11 2006)

Petitioners filed a Petition for Review to the Supreme Court of Texas. The "Issues Presented" by the plaintiffs set forth the following:

> 1. El Paso County, through a County judge, contracted with a doctor to be Medical Director for prisoners in its jail. The contract gave the Medical Director final decision making authority, including policy decisions, for medical cases and medication. Under the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. §1983, was this Medical Director the "policymaker" whose acts would give rise to the County's liability?
>
> 2. Is there legally sufficient evidence to support a 42 U.S.C. §1983 verdict for denial of medical care to a pretrial detainee, guaranteed by the Fourteenth Amendment to the Constitution of the United States, when the medical policymaker was directly told of the need for medical care, the policymaker promised to address the situation and then failed to provide adequate medical care?
>
> 3. May a Court of Appeals, ignoring the requirements of *City of Keller v. Wilson*, 168 S. W. 3d 802 (Tex. 2005) in reversing a jury verdict by performing a no evidence review: a) decide that part of a witness's testimony supporting the verdict is not credible; b) take testimonial evidence supporting verdict out of context so that it no longer supports the verdict; or c) ignore substantial testimony that supports the verdict.
>
> 4. Does a state appellate court's refusal to consider evidence which supports a 42 U.S.C. §1983 verdict,

as required by its own standard of review, violate the §1983 plaintiff's right to procedural due process under the United States Constitution. (Unbriefed; implicit in response to Issues 1, 2, 3)

5. Is there legally sufficient evidence to show that El Paso County was deliberately indifferent in failing to train its jail staff to appropriately respond to seizures, a common and dangerous occurrence in the jail setting? (Unbriefed; implicit in response to Issues 1, 2, 3).

6. Was there legally sufficient evidence of a policy, or a persistent widespread practice that was tantamount to a policy, which was deliberately indifferent to a serious medical need that Dr. Miranda had and which caused his death? (Unbriefed; implicit in response to Issues 1, 2, 3).

THE SUPREME COURT OF TEXAS DENIED REVIEW

Petition for review denied by *Dorado v. County of El Paso*, 2006 Tex. LEXIS 447 (Tex., May 5, 2006).

Petitioners then filed a Petition for Rehearing On Denial of Petition for Review in the Supreme Court of Texas, which raised the following issues:

a) El Paso County, through its County judge, contracted with a doctor to be the Medical Director for prisoners in its jail. The contract gave the Medical Director final decision making authority, including policy decisions, for medical cases and medication. Under the Fourteenth Amendment to the Constitution of the United States and 42 USC §1983, was this Medical Director the "policymaker" whose acts would give rise to the County's liability?

b) Is there legally sufficient evidence to support a 42 USC § 1983 verdict for denial of medical care to a pretrial detainee, guaranteed by the Fourteenth Amendment to the Constitution of the United States, when the medical policymaker was directly told of the need for medical care, the policymaker promised to address the situation and then failed to provide adequate medical care?

c) May a state Court of Appeals, contrary to the requirements for "no evidence" reviews as stated in *City of Keller v. Wilson* accept conflicting evidence which does not support the verdict and fail to address substantial testimony that supports the verdict. Does this practice violate the §1983 plaintiffs' right to procedural due process under the United States Constitution?

The Supreme Court of Texas denied rehearing. *Dorado v. County of El Paso*, 2006 Tex. LEXIS 579 (Tex., June 23, 2006).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The Texas Court of Appeals has decided, and the Texas Supreme Court has refused to review, important federal questions that conflict with decisions of this Court and questions of federal law that have not been but should be settled by this Court. Four Justices of this Court have observed that the jurisprudence of §1983 is "hardly settled," and should be "reexamined," *Board of the County Commissioners of Bryan County, Oklahoma v. Brown.*[15] This case involves two important concepts which fall into that "hardly settled"

---

[15]520 US 397, 430, 431 (1997).

category: the meanings of "final policy maker" and "deliberate indifference." Both terms embody mixed questions of law and fact or constitutional facts. Both present issues that were resolved wrongly below and in conflict with relevant decisions of United States Courts of Appeals.

(1) A contract between the County and Dr. Block provided for him to set policy for medical services at the jail. The Texas Court of Appeals did not deny that Dr. Block made policy for medical services at the jail. It set forth parts of the contract that explicitly provided for it. It held, however, that the sheriff was the final policy maker for the jail and, therefore, Dr. Block's conduct could not incur liability for the County. It decided that the sheriff as final policy maker – and only he - set medical treatment policy for §1983 purposes. That conclusion betrays a complete misunderstanding of this Court's §1983 municipal liability jurisprudence. "Policy maker" performs a mediating role - avoiding respondeat superior while at the same time making clear that delegation must be taken into account. Otherwise municipalities would be provided with a road map for insulating themselves for unconstitutional acts, as the plurality in *City of St. Louis v. Praprotnik* warned, positing a defendant County "insulated ... from liability simply by delegating ... policymaking authority to others[.]"[16] But that is what the court below has provided. It has separated legal responsibility from policy making authority. Worse still, the authority was formally delegated. In effect, Texas counties have a recipe for avoiding their federal constitutional duty because they have immunity so long as they hire a medical director.[17]

---

[16]*City of St. Louis v. Praprotnik*, 485 US 112, 126 (1988).

[17]A side effect of the ruling below is that it may encourage filing cases in federal court even when a plaintiff may be fairly confident that he or she is entitled to relief on non-constitutional, state common law and statutory

The Court of Appeals' formalism does not fairly reflect the language or intent of *Monell*, the seminal § 1983 municipal liability case. Merely to intone "policymaker" loses sight of what *Monell* meant. *Monell* speaks more broadly. It holds that: "...it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy (italics added) inflicts the injury that the government as an entity is responsible under §1983."[18] As pointed out in *Jett v. Dallas Ind. School Dist.*,[19] the Court looks to "relevant legal materials, including state and local positive law, as well as 'custom and usage' having the force of law" in deciding the policy maker issue.

Monell was based on the legislative history of §1983, but also expressed common sense: it would be undesirable to fasten liability on governmental entities under respondeat superior for every tortious act of numerous employees over which they had little or no control and who were not meaningfully involved in policies of the municipality. The division of cases into those where there should be municipal liability and others expresses concern to make whole persons injured by municipal wrongdoing, the role of tort law in deterring harmful conduct and, at the same time, preserving the municipality from excessive liability caused by the inevitable injuries inflicted by members of large, diverse municipal workforces which could break the municipal bank. The focus is not on identifying, in wooden fashion, an individual

---

grounds, which would require federal courts to decide many state law questions.

[18]436 US 658, 694 (1978).

[19]491 US 701, 737 (1989).

policymaker. It is on "acts that may fairly be said to represent official policy."

That standard has been at the heart of decisions like *Bennett v. City of Slidell*,[20] in which the Fifth Circuit recognized that policy making might be delegated, as it was by the county's contract and the sheriff's approval of that contract with Dr. Block. Bennett provides that delegated policymaking, to fall under *Monell's* policy maker rubric, should encompass the power "to set goals and to structure and design the area of delegated responsibility."[21] Block's contract did just that. He was charged with "developing and implementing policies that will assure high quality medical and nursing care. He shall also provide and set specific protocols, policies and procedures...." Other provisions in his contract are of a similar nature.

Policymaking authority can be shared, as pursuant to that contract. Praprotnik observed that "there will be cases in which policymaking responsibility is shared among more than one official or body."[22]

So plenary was Dr. Block's power over medical policy at the jail that it trumped custodial concerns. Moreover, as a practical matter, in day-to-day operations, everything that went on at the jail with regard to health care was determined by the jail doctor. From beginning to end, decisions or failure to make decisions, were formally and exclusively in the hands of Dr. Block. To recognize this reality does not expose a municipality to liability for any tort by, for example, a hospital orderly. But it calls to account governmental actors who have power to harm

---

[20]728 F.2d 762 (5th Cir. 1984)

[21]728 F.2d at 769.

[22]*Praprotnik*, 485 US at 126.

others if they use that power with deliberate indifference. The decision below negates the legal implication of Dr. Block's power by declaring he was not a "final" policy maker. But, as the next section demonstrates, Block's actions were "final" in a legal and practical sense.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF COURTS OF APPEALS ON WHAT CONSTITUTES "FINAL" POLICY MAKING.

The perhaps universal rule has been that an official's decision is not final if it is subject to review; a decision is final if it is not subject to review. Addressing the question of what is "final" the Eighth Circuit in *Williams v. Butler*[23] held that terminating an employee was a "final" policy decision: "Thus, under state law Butler was exercising final policymaking authority in his court. Unlike the plaintiff in *Praprotnik*, Williams had no internal avenues of appeal available to challenge her termination; Butler's decision was final. We emphasize that Butler's authority was not constrained by any other policymaker (italics in original)." Consequently, the Court held that Butler was the "final" policymaker. In *Worsham v. City of Pasadena*[24] the Fifth Circuit held that the challenged action had not been pursuant to any "final" policy making authority because there were "meaningful review procedures," "right of review" and "effective review." In *Hyland v. Wonder*[25], the Ninth Circuit held that there had been final policy action where "the uncontradicted evidence in the record establishes that the officials with authority over access to

---

[23]863 F. 2d 1398, 1402, 1403 (8th Cir. 1988)

[24]881 F. 2d 1336 at 1340-1341 (5th Cir. 1989).

[25]117 F. 3d 405, 416 (9th Cir.1997), *amended* 127 F3d 1135, *cert. den.* 522 US 1148

Juvenile Hall, Judge Wonder of the Superior Court and later the JPC, both ratified the ban of Hyland from Juvenile Hall, and so municipal liability exists." [26]

In the context of this case there was no right of review of Dr. Block's actions nor was there ratification or failure to ratify with regard to Dr. Miranda. What Dr. Block did was "final policy." The sheriff's power to make a final policy decision so far as Dr. Miranda was concerned did not exist for two reasons. First, there was no procedure, and the County has not pointed to any procedure by which Dr. Miranda could have appealed to the sheriff for his medication. Second, even if a procedure had existed it defies reason to imagine how someone in Dr. Miranda's situation could have employed it.

2.This Court should grant the writ to decide whether the court below, (a) by switching the legal standard of regular deferential review of jury verdicts to review de novo, burdened the exercise of civil rights contrary to the due process clause of the Constitution and (b) whether as a matter of constitutional fact it came to the erroneous conclusion that Dr. Miranda had not died as a result of deliberate indifference.

(a) The Texas Court of Appeals subjected the jury verdict that found defendant liable under § 1983 to de novo appellate review with respect to the "deliberate indifference" issue, although under Texas law, a jury verdict in favor of a party with the burden of proof on a state law tort claim is reviewed on appeal only under a "no evidence" standard. *City of Keller*

---

[26] A Massachusetts District Court has held "Because there has been no indication that the Town manager's appointment decisions are subject to review by other municipal officials such as the Board of Selectmen, summary judgment is not appropriate." *Putnam v. Town of Saugus*, 365 F. Supp. 2d 151, 193 (D. Mass. 2005). At the same time, the opinion suggested that there was some uncertainty about the rule, citing Chemerinsky, Federal Jurisdiction, §8.5.2 at 497 (4th Ed. 2003).

v. Wilson.[27] But, state courts may not burden enforcing federal claims by onerous or discriminatory procedural obstacles. Or as stated in *Felder v. Casey*,[28] which held that a state may not impose a notice of claim requirement for §1983 claimants before they file suit in state court, "[f]ederal law takes state courts as it finds them only insofar as those courts employ rules that do not 'impose unnecessary burdens upon rights of recovery authorized by federal laws.'" In that vein, *Howlett v. Rose*,[29] held that the Supremacy Clause barred Florida's state courts from interpreting the state's sovereign immunity statute as permitting individuals to bring state law tort claims against municipalities in the state's courts, while barring jurisdiction over federal §1983 claims in those courts. The state court could not discriminate against the federal claim by declining jurisdiction to hear it.[30] Similarly, it would violate the due process clause for a state to employ a shorter statute of limitations for federal claims than for comparable state claims. *Republic Pictures Corp. v. Kappler*.[31] *Dice v. Akron, Canton & Youngstown R. R.*[32] resembles petitioners' case in that it involved taking fact finding on a crucial issue away from the jury and placing it with the judge. This Court held that FELA's requirement of jury trial could not be overridden by Ohio law, which confided to the judge the issue of whether an employee's release had been obtained by fraud. This Court required that

---

[27]168 S.W.3d 802 (Tex. 2005).

[28]487 U.S. 131, 150 (1988).

[29]496 U.S. 356 (1990).

[30]496 U.S. at 378.

[31]327 U.S. 757 (1946) (*per curiam*).

[32]342 US 359 (1952).

the federal requirement of fact finding by the jury, not a judge, be observed.

Petitioners submit, that in this case, while there was no requirement under §1983 that a jury be impaneled, once it was there, to take from it ordinary jury fact finding by means of de novo appellate review, which Texas does not do in other cases, burdened plaintiffs' §1983 rights in a discriminatory manner.

The Court of Appeals should have abided by its own standard of review and deferred to the jury determination of "deliberate indifference," which was based on ample evidence. The aberrational standard of review that it employed in this case burdened enforcement of plaintiffs' civil rights in violation of the due process clause.

THE OPINION BELOW CONFLICTS WITH DECISIONS OF UNITED STATES COURTS OF APPEALS ON "DELIBERATE INDIFFERENCE."

The Texas Court of Appeals opinion conflicts with decisions of several United States Courts of Appeals decisions on what constitutes "deliberate indifference." The Texas Court held that Dr. Block had not, as a matter of law, committed a constitutional violation, likening his conduct to a simple act of medical malpractice. It argued that his misdeed only involved the "nature and timing" of treatment as distinct from "failure" to provide any medical care at all.[33]

But the Fourth Circuit in *Cooper v. Dyke*[34], held actionable a two hour delay in treating a person in custody with a gun shot

---

[33] *County of El Paso v. Dorado*, 180 S.W.3d 854, 868 (Tex. App.--El Paso 2005).

[34] 814 F.2d 941, 945-46 (4th Cir. 1987)

wound. The Eighth Circuit in *Plemmons v. County of Pulaski*[35] held actionable a fifty minute delay for an inmate with chest pains. The Fifth Circuit referred to a government officer's attempt to distinguish the delay in treatment from the complete denial of medical care as "a verbal quibble," concluding that "for the purposes of a deliberate indifference claim, a deliberate delay in providing medical care is no different than a deliberate denial of the same care for the same time, and, in this context, no federal court has ever distinguished the two."[36] Other Circuits are in accord.[37]

But, Dr. Block's deliberate indifference to the condition of inmate patients was manifested other than in delay in providing medication. He had two outside jobs. He had to pay for additional medical help with his own funds and declined to do so. He set up a system of telephone reporting with Licensed Vocational Nurses (LVNs), received medical reports on prisoners' conditions from them and dispensed medical advice to them by telephone. He was disdainful of his patient population. He did not train personnel to deal with seizures, other than to contact him, including calling him at home, where he was after 3PM daily and all weekends. He had no protocol for nurses to deal with one of the signal events in this case, to

---

[35]439 F.3d 818 (8th Cir. 2006)

[36]*United States v. Gonzalez*, 436 F.3d 560, 577 (5th Cir. 2006) (responding to defense of government officers criminally prosecuted for denial of medical care to detainee).

[37]*Miranda v. Munoz*, 770 F.2d 255, 259 (1st Cir. 1985) (delay in treatment which allowed pretrial detainee to deteriorate beyond recovery); *Duncan v. Duckworth*, 644 F.2d 653, 654 (7th Cir. 1981) (failure to promptly schedule surgery once the need for it was recognized); *Jett v. Peterson*, 439 F.3d 1091 (9th Cir. 2006)(delay in setting broken thumb); *Mandel v. Doe*, 888 F.2d 783, 789 (11th Cir. 1989)(delay in treating broken leg).

seek out why a seizure patient (or other possibly disabled inmate) did not appear to take his medication after his name was called out. Dr. Miranda, who had not appeared at medication call-out was later found convulsing on the floor. Dr. Block's system did not act upon a crucial fact when Dr. Miranda was booked: checking on his medication when he reported he suffered from convulsions and had medication on his person at that time.

Finally, whatever imagined ambiguities, it might be argued, existed from Thursday night to Saturday night, for the 24 hours before Dr. Miranda died, Dr. Block personally knew of Dr. Miranda's condition. His knowledge about Dr. Miranda was complete in all relevant respects. But he did not come to the jail to examine or attend to Dr. Miranda, even though he had promised to. After Dr. Miranda died, Block never inquired about the cause of death. How much more indifferent could someone be?

The jury in this case heard testimony that Nurse Dominguez actually warned Dr. Block of the need to see to Miranda because Dominguez did not know how to handle the situation.[38] It heard that Dr. Block was aware of the risk of

---

[38]"I called Doctor Block because I was concerned for two reasons why--one, because he had told me he was taking so high dosage of Ativan: the other one, because I was concerned that he was going to develop a seizure. So I called Doctor Harold Block. I gave him a report, as usual, about the condition of the inmate was in; and, Doctor Harold Block gave me orders, and he said he was going to be there in the morning."

Q: Did you let Doctor Block know the extent of the medication that this man was using?
A: Yes, I did.
Q: Did you express your concern to Doctor Block--that you really didn't know how to assess this man and that he needed Doctor Block to check him out?
A: Yes, I did.

denying an Ativan dependent patient medicine.[39] Moreover, the jury heard testimony of Dr. Block's hostile attitude towards prisoners in general, ("scumbags," burdens on society," past acts of denial of needed medical care).[40] As the Fifth Circuit has noted in another case in which a prisoner died in jail after having been treated with deliberate indifference:

> The jury was carefully and correctly charged that mere negligence was insufficient to sustain a finding for the plaintiffs. The jury obviously believed that the appellants had crossed the line between misfeasance and conscious cruelty. In a case such as this, where the attitudes and states of mind of the defendants weigh so heavily, we are quite reluctant to read between the lines of the record. We commit our trust to the jurors who saw and heard the witnesses.[41]

CONSTITUTIONAL FACTS

Dr. Block was a "policy maker" whose "deliberate indifference," the jury found, led to the death of Dr. Miranda,

---

Q: And did Doctor Block tell you whether he would be in that night to see him or what he would do?
A: He just gave me orders to administer medication--two milligrams--and that he would be there in the morning.
Q: Did you emphasize to Doctor Block that he needed to see him in the morning?
A: Yes, I did.
Q: And what did Doctor Block say when you emphasized that?
A: That he'll be there.
(13-55-57).

[39]At 10-144.

[40]13-72, 66, 58, 73-74, 74.

[41]*Fielder v. Bosshard*, 590 F.2d 105, 108 (5th Cir. 1979).

plaintiffs' husband and father. Within the jail system there was no appeal beyond him, either in theory or in fact. The Court of Appeals read the record de novo and came to a contrary conclusion.

This case turns on the meaning of two terms that this Court has coined in interpreting 42 USC §1983, "policy maker" or "final policy maker" and "deliberate indifference." Both are central to interpreting and applying that civil rights statute. They are, quintessentially, words that describe constitutional facts. As such, their meaning and application are peculiarly within the power of this Court to explicate and apply. That is especially appropriate in the context of this case, which turns on factual definition, although it is intertwined with legal meaning.

This Court's role in ascertaining constitutional facts was set forth in *Norris v. Alabama*,[42] one of the Scottsboro decisions, over seventy years ago. The Court reviewed an equal protection claim where blacks were excluded from a grand jury. Conceding that the inquiry into the cause of exclusion was an issue of fact, Chief Justice Hughes wrote:

> That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a

---

[42]294 US 587 (1935).

> federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured.[43]

The Court did not inquire into historical events or judge the credibility of witnesses. It independently determined what weight to give facts in the record. It weighed uncontroverted facts that there were no blacks on the jury rolls, and that no black person had served on a jury in the county in living memory, against county officials' claims that no racial motivation lay behind these omissions, and concluded that the evidence supported the factual conclusion that blacks had been excluded from juries because of their race. Before then, and since, this Court has independently determined constitutional facts, particularly where civil rights have been concerned.[44]

In this case, while some of the constitutional facts have been contested by the Court of Appeals and by Respondent, the meanings of "final policy maker" and "deliberate indifference" are not so difficult as might be in other contexts. There is no

---

[43]294 US at 589.

[44]In *Times v. Sullivan*, Justice Brennan wrote that: "'[w]e must make an independent examination of the whole record,' so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression". 376 US 254, 285 (1964). In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, Justice Souter, writing the opinion for the Court, wrote: The review . . . is a rule of federal constitutional law,'" which does not limit our deference to a trial court on matters of witness credibility, (citation omitted) but which generally requires us to 'review the finding of facts by a State court . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts," 515 US 557, 567 (1995). In a coerced confession case, *Miller v. Fenton*, 474 US 104, 112 (1985), Justice O'Connor, delivering the majority opinion, wrote to the same effect.

need to overcome the barrier of a jury or nisi prius determination. The issue here unlike that in some constitutional fact cases, arises because the Texas Court of Appeals reviewed the record de novo and overturned the jury verdict. This Court has always been empowered to do the same with regard to constitutional facts. Its task has been made easier because without contradiction or with only slight disagreement on the record, Petitioners submit that they have established that the Court of Appeals' assessment of the record is demonstrably wrong.

The clearly erroneous conclusion on matters of constitutional fact are within the purview of this Court to correct.

CONCLUSION

Petitioners pray that this Court grant the Petition for Writ of Certiorari, reverse the judgment below and reinstate the judgment of the trial court.

Respectfully submitted,
JACK GREENBERG
Counsel of Record
COLUMBIA UNIVERSITY
SCHOOL OF LAW
435 W. 116th Street
New York, NY 10027
(212) 854-8030

JAMES SCHERR
JEFFREY S. ALLEY
Counsel for Petitioner

JOSIAH GREENBERG
ROY B. OSER
Of Counsel

APPENDIX

APPENDIX A

COURT OF APPEALS OF TEXAS,
EIGHTH DISTRICT, EL PASO

THE COUNTY OF EL PASO,
Appellant,

v.

JESSIE DORADO, INDIVIDUALLY AND AS MOTHER AND NEXT FRIEND OF BRIANNA ALEXIS MIRANDA, A MINOR AND ON BEHALF OF THE ESTATE OF EDUARDO MIRANDA A/K/A EDUARDO MIRANDA DUARTE, DECEASED,
Appellees.

No. 08-03-00421-CV

---

180 S.W.3d 854; 2005 Tex. App. LEXIS 10011
December 1, 2005, Decided

JUDGES: Before Panel No. 2, Barajas, C.J., McClure, and Chew, JJ.

OPINION BY: RICHARD BARAJAS

OPINION

[*859] On the Court's own motion, we withdraw our opinion and judgment dated September 15, 2005 and substitute the following.

This is an appeal from a jury verdict rendering judgment against the County of El Paso under *42 U.S.C. § 1983* arising

[*860] from the death of Eduardo Miranda while he was incarcerated in the El Paso County jail. Appellant filed a motion for new trial which was overruled by operation of law. For the reasons stated, we reverse the judgment of the trial court and render judgment in favor of Appellant.

I. FACTUAL AND PROCEDURAL BACKGROUND

On July 25, 1997, Jessie Dorado ("Dorado"), in her individual capacity, as Mother and Next Friend of Brianna Alexis Miranda, and on behalf of the Estate of Eduardo Miranda a/k/a Eduardo Miranda Duarte ("Dr. Miranda"), deceased, sued the County of El Paso ("El Paso County"). Dorado alleged that the decedent died after he was denied access to his seizure medication following his arrest and subsequent detention in the El Paso County Detention [**2] Facility. Appellees sued for damages pursuant to the Texas Wrongful Death Act and the Survival Statute and for constitutional deprivations under *42 U.S.C. § 1983*. Appellant filed a Plea to the Jurisdiction based upon the lack of applicability of the Wrongful Death Act to Counties. The trial court denied the plea and the County appealed. This Court reversed the judgment of the trial court and rendered judgment in favor of the County regarding the question of applicability of the wrongful death statute to counties.

Subsequently, Appellant filed a motion for summary judgment which was granted in part and denied in part. Appellant filed a second interlocutory appeal raising a question regarding qualified immunity of the nurses, which was denied. In May of 2003, trial was had to a jury on allegations of the violation of the constitutional rights of Eduardo Miranda under *42 U.S.C. § 1983* and the Texas Tort Claims Act. The jury rendered a verdict against Appellees under the Texas Tort Claims Act, but in favor of Appellees for violation of Dr. Miranda's constitutional rights. The trial court entered

judgment on June 16, 2003 in the amount of [**3] almost $ 5 million dollars in damages and attorney's fees. Appellant filed a motion for new trial which was overruled by operation of law. This appeal follows.

Dr. Miranda was arrested for outstanding traffic warrants on the evening of February 27, 1997. He was booked into the El Paso County Detention Center in the early hours of February 28, 1997. At the time of his booking, Dr. Miranda informed jail personnel he had a history of convulsions. He did not inform them, however, that he was under medication for the condition. In addition, Dr. Miranda made other false statements to the intake person during the booking process. Dr. Miranda indicated that he was unemployed and provided an incorrect address.

On March 1, 1997, Dr. Miranda told Nurse Juan Carlos Dominguez that he was under physician's orders to take two milligrams of Ativan each night to control his seizures. This information was also untruthful. Dr. Miranda was actually self prescribing a much higher dose of the medication. Nurse Dominguez in reliance on the information provided by Dr. Miranda, confirmed the prescription and contacted Dr. Harold Block, the jail physician, for further instructions. Dr. Harold Block gave [**4] orders to give Dr. Miranda his prescribed medications, which was done. The next night, March 2, 1997, Nurse Raul Tellez was responsible for administering Dr. Miranda's prescription. Nurse Tellez [*861] summoned Dr. Miranda around 8 p.m., but Dr. Miranda did not respond. As a result, he did not receive his prescribed medication. Around 11:30 p.m., Dr. Miranda suffered a seizure and Nurses Junette Davis and Vivian Perez responded to the medical assistance call. Nurse Davis stayed with Dr. Miranda while Nurse Perez returned to the clinic to call Dr. Block for direction. Dr. Block instructed Nurse Perez to administer a four milligram injection of Ativan and a five milligram injection of Haldol. Dr. Miranda

was moved from his cell to the jail clinic for treatment. At the clinic, the medical staff realized Dr. Miranda was no longer breathing. He was transported to the hospital by EMS. He died less than an hour after his seizure.

The record contains different accounts of what occurred during the hour prior to Dr. Miranda's death. The County contends Dr. Miranda suffered a seizure, but had recovered before medical staff arrived to assist him. He then became violent and had to be restrained. He was [**5] then carried on a stretcher to the jail clinic, handcuffed and shackled, and given an injection of Ativan. After the injection was given, the staff noticed Dr. Miranda was no longer breathing and had turned blue. The medical staff tried to revive him and called an ambulance. All efforts to resuscitate him were unsuccessful.

The Dorado family contends that Dr. Miranda was experiencing seizures before and during the time he was restrained. Their evidence suggests that he was not violent, but rather convulsing uncontrollably at the time he was forcibly restrained. There is also evidence indicating that the restraints used, the position his body was placed in, and the time delays in treatment could have caused Dr. Miranda to stop breathing.

Dr. Miranda's widow, Jessie Dorado, brought suit alleging wrongful death under the Texas Tort Claims Act and asserting claims under *42 U.S.C. § 1983*. This case was tried to a jury on the 2nd of May, 2003 and a verdict was rendered in favor of the County on the claims filed under the Texas Tort Claims Act but in favor of Dorado under *42 U.S.C. § 1983*. The trial court entered a judgment against the County [**6] for almost $ 5 million in damages and attorney's fees.

II. ISSUES ON APPEAL

Appellant files six issues on appeal. Issues One and Five complain of sufficiency of the evidence regarding the jury's

verdict under *42 U.S.C § 1983* and the court's findings of facts and conclusions of law regarding the award of attorney's fees. Issue Two complains of the trial court's ruling allowing the testimony of Dr. Glenn Johnson, a physician as an expert witness. Issue Three complains of the jury instructions submitted by the court. Issue Four asserts that the trial court committed error by entering a judgment against the County under *42 U.S.C. § 1983* on the grounds that the Appellees are not entitled to recover damages against the County and that the only proper plaintiff is the Estate of Eduardo Miranda. Issue Six is a challenge to the interest rates assessed by the trial court.

III. STANDARD OF REVIEW

In reviewing a "no evidence" challenge, the appellate court considers only the evidence and reasonable inferences therefrom that tend to support the jury findings, disregarding all contrary evidence and inferences. *Redman Homes, Inc. v. Ivy, 920 S.W.2d 664, 667, 39 Tex. Sup. Ct. J. 481 (Tex. 1996).* [**7] If there is any evidence of probative force to support the jury's findings, however, a motion for j.n.o.v. must be denied. *See Navarette v. Temple Indep. Sch. Dist., 706 S.W.2d 308, 309, 29 Tex. Sup. Ct. J. 282 (Tex. 1986).*

[*862] A "no evidence" or legal insufficiency point is a question of law which challenges the legal sufficiency of the evidence to support a particular fact finding. There are two separate "no evidence" claims. When the party having the burden of proof suffers an unfavorable finding, the point of error challenging the legal sufficiency of the evidence should be that the fact or issue was established as "a matter of law." When the party without the burden of proof suffers an unfavorable finding, the challenge on appeal is one of "no evidence to support the finding." *In re Estate of Livingston, 999 S.W.2d 874, 879 (Tex. App.--El Paso 1999, no pet.); see*

Creative Manufacturing, Inc. v. Unik, Inc., 726 S.W.2d 207, 210 (Tex. App.--Fort Worth 1987, writ ref'd n.r.e.).

When attacking the legal sufficiency of the evidence to support an adverse finding on an issue for which he had the burden of proof, i.e., challenging the trial court's finding as a [**8] matter of law, the appellant must demonstrate on appeal that the evidence conclusively established all the vital facts in support of the issue. *In re Estate of Livingston, 999 S.W.2d at 879*; *Sterner v. Marathon Oil Company, 767 S.W.2d 686, 690, 32 Tex. Sup. Ct. J. 266 (Tex. 1989)*; *Kratz v. Exxon Corp., 890 S.W.2d 899, 902 (Tex. App.--El Paso 1994, no writ)*; *Chandler v. Chandler, 842 S.W.2d 829, 832 (Tex. App.--El Paso 1992, writ denied)*. A party attempting to overcome an adverse fact finding as a matter of law must surmount two hurdles. *In re Estate of Livingston, 999 S.W.2d at 879; Sterner, 767 S.W.2d at 690.* First, the record must be examined for evidence that supports the finding, while ignoring all evidence to the contrary. *In re Estate of Livingston, 999 S.W.2d at 879; Sterner, 767 S.W.2d at 690; Kratz, 890 S.W.2d at 902.* Second, if there is no evidence to support the finding, then the entire record must be examined to see if the contrary proposition is established as a matter of law. *In re Estate of Livingston, 999 S.W.2d at 879; Sterner, 767 S.W.2d at 690; [**9] Kratz, 890 S.W.2d at 902.* Only if the contrary position is conclusively established will the point of error be sustained. *In re Estate of Livingston, 999 S.W.2d at 879-80; Kratz, 890 S.W.2d at 902; Chandler, 842 S.W.2d at 832.* We review Appellant's issue to resolve the question of liability under 42 U.S.C. § 1983 as a matter of law.

IV. 42 U.S.C § 1983

Deliberate Indifference and Custom, Policy or Practice

Title *42 U.S.C. § 1983* provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.

42 U.S.C. § 1983.

A cause of action under this section involves two essential elements: (1) the conduct complained of was committed by a person acting under color [**10] of state law, and (2) the conduct deprived a person of rights, privileges, or immunities secured by the Constitution or the laws of the United States. *Parratt v. Taylor, 451 U.S. 527, 535, 101 S.Ct. 1908, 1913, 68 L.Ed.2d 420 (1981), overruled in part on other grounds, Daniels v. Williams, 474 U.S. 327, 331-32, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).* Unlike a claim asserted pursuant [*863] to state law, consent to suit is not required. *See Gomez v. Housing Authority of the City of El Paso, 148 S.W.3d 471, 477-78 (Tex. App.--El Paso 2004, pet. denied).*

As a pretrial detainee, Dr. Miranda's constitutional rights flowed from the due process guarantees of the Fourteenth Amendment rather than from the *Eighth Amendment's* prohibition against cruel and unusual punishment. *See Hare v. City of Corinth, 74 F.3d 633, 639 (5th Cir. 1996)* (en banc). *42 U.S.C. § 1983* authorizes suits against state and local government officials who violate a person's constitutional rights. In *Estelle v. Gamble*, the Supreme Court held that the *Eighth Amendment's* proscription of cruel and unusual punishments forbids jail officials [**11] to be deliberately indifferent to inmates' serious medical needs because such indifference is itself cruel and unusual punishment. *429 U.S.*

97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Pretrial detainees also have a right to be free from jail officials' deliberate indifference to their serious medical needs. *Hare, 74 F.3d at 643.* This right springs from both procedural and substantive due process and is at least as great as that mandated by the *Eighth Amendment. Id.*; *see also Bell v. Wolfish, 441 U.S. 520, 535, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).* To establish a violation of this right, an inmate must show that he or she was subjected to a substantial risk of serious harm. The inmate must also prove that the jail official was subjectively aware of facts from which an inference could be drawn that a substantial risk of serious harm existed and then actually drew such an inference. *Farmer v. Brennan, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)*; *Harris v. Hegmann, 198 F.3d 153, 159 (5th Cir. 1999).* Finally, the inmate must establish that the jail official's response to the perceived risk [**12] of harm shows that official's deliberate indifference. *Farmer, 511 U.S. at 844-45. Alejo v. Dallas County, 2005 U.S. Dist. LEXIS 4702, No. Civ.A. 303CV1612N, 2005 WL 701041, at *1 (N.D.Tex. March 24, 2005).*

When such a detainee complains of unconstitutional medical treatment, there is no significant legal distinction between pretrial detainees and convicted prisoners. *Gibbs v. Grimmette, 254 F.3d 545, 548 (5th Cir. 2001).* When a pretrial detainee's claim is based on a jail official's episodic act or omission, "the proper inquiry is whether the official had a culpable state of mind in acting or failing to act." *Hare, 74 F.3d at 643.* To establish liability, a pretrial detainee must "show that a state official acted with deliberate indifference to a substantial risk of serious medical harm and that injuries resulted." *Wagner v. Bay City, Tex., 227 F.3d 316, 324 (5th Cir. 2000).*

In an episodic-act-or-omission case against a municipality, "an actor is usually interposed between the detainee and the

municipality, such that the detainee complains first of a particular act of, or omission by, the actor and then points derivatively [**13] to a policy, custom or rule (or lack thereof) of the municipality that permitted or caused the act or omission." *Flores v. County of Hardeman, Texas, 124 F.3d 736, 738 (5th Cir. 1997)*. To succeed in holding a municipality liable under these standards, the plaintiff must establish not only that a municipal employee acted with subjective deliberate indifference but also that the employee's act resulted from a policy or custom adopted or maintained by the municipality with objective deliberate indifference to the plaintiff's constitutional rights. *See Olabisiomotosho v. City of Houston, 185 F.3d 521, 526 (5th Cir. 1999)*.

Municipalities and other local government units are "persons" within the [*864] meaning of *section 1983* and may be liable for a constitutional tort suffered as the result of an official policy, custom or pattern. *See Monell, 436 U.S. at 690-91, 98 S.Ct. at 2035-36*. A municipality may be held liable for a single act or decision of a municipal official with final policy-making authority. *Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737, 109 S.Ct. 2702, 2724, 105 L.Ed.2d 598 (1989)*; *City of St. Louis v. Praprotnik, 485 U.S. 112, 123, 108 S.Ct. 915, 924, 99 L.Ed.2d 107 (1988) [**14]* (plurality opinion); *Pembaur v. City of Cincinnati, 475 U.S. 469, 480, 106 S.Ct. 1292, 1298, 89 L.Ed.2d 452 (1986)*. But it cannot be held liable solely because it employs a tortfeasor--or, in other words, a municipality cannot be held liable under section 1983 on a respondeat superior theory. *Monell, 436 U.S. at 691-92, 98 S.Ct. at 2036; Gomez, 148 S.W.3d at 478*.

Official Custom, Policy or Practice

When analyzing a *section 1983* claim against a municipality or governmental entity, the court must decide if the governmental entity promulgated "an official policy, practice, or custom,"

which could subject it to *section 1983* liability. *Monell, 436 U.S. at 690-94, 98 S.Ct. at 2035-37.* The Fifth Circuit has defined an "official policy" for the purposes of section 1983 liability to be either: (1) a policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's law-making officers or by an official to whom the lawmakers have delegated policy-making authority; or (2) a persistent widespread practice of city officials or employees, which, although not authorized by [**15] officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. *Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984).*

The facts of this case do not present an "official policy" under these definitions. There is no constitutional requirement that municipalities provide jailers and law enforcement personnel with sophisticated medical training so that they will detect hidden medical problems. The Fifth Circuit has applied this principle to the detection of suicidal tendencies in pretrial detainees:

> It is one thing to require a municipality to train its police officers to recognize and not ignore obvious medical needs of detainees with known, demonstrable and serious mental disorders. It is quite another to require as a constitutional minimum that a municipality train its officers to medically screen each pretrial detainee so that officers will unerringly detect suicidal tendencies. The latter requires the skills of an experienced medical professional with psychiatric training, an ability beyond that required of the average police officer by the *due process clause. Burns v. City of Galveston, Texas, 905 F.2d 100, 104 (5th Cir. 1990), [**16] disagreed with on other grounds, Hare, 74 F.3d at 633.*

We believe that the same rational applies to the pretrial detainee who is not forthcoming about his or her need for, or dependence upon, medication. The individual bears the responsibility for informing the jail personnel about his or her medical condition in a truthful manner. The County of El Paso, therefore, was not required to train its jailers how to recognize the ambiguous signs of drug dependency or drug overdose. While a more extensive medical examination might have revealed Dr. Miranda's drug dependency, the County and its jailers were not constitutionally required to provide such a high standard of care. Moreover, it cannot be [*865] inferred that any additional training of or screening by the jail staff would have prevented Dr. Miranda's seizure from his self-induced abuse of medication. At the time of his arrest, Dr. Miranda failed to identify the nature of his medical condition in a truthful manner. The jail personnel responded to the information provided to them by Dr. Miranda. It is unreasonable to require that the jail personnel ascertain when an individual does not disclose the extent of his or her [**17] drug dependency. The fact that the effects of his dependency did not manifest themselves until several hours after he had been taken into custody does not give rise to an action against the County.

Addressing Appellees' claims that the EPCDF failed to provide Dr. Miranda proper medical care, the Court finds that as a matter of law the Defendant's policies neither deprived Dr. Miranda of adequate medical assistance, nor violated the *Fourteenth Amendment's* required level of care. Taken in its most favorable light, if all of the facts in Dr. Miranda's Sixth Amended Original Petition are true, the Appellant did in fact provide Dr. Miranda with prompt medical care when jail personnel were informed of Dr. Miranda's need for medication. The EPCDF provided Dr. Miranda with the opportunity to receive medical care as needed. When Dr. Miranda suffered his

seizure during the late evening of March 2, 1997, the jail nurses responded to the medical emergency and immediately took action by contacting Dr. Block, moving Dr. Miranda to the jail clinic, administering medication as instructed by Dr. Block, and contacting EMS to transport Dr. Miranda to the hospital when the jail personnel determined [**18] he was not breathing. Based upon these facts, the Court finds as a matter of law that the Defendant's policies neither deprived Dr. Miranda of adequate medical assistance, nor violated the *Fourteenth Amendment's* required level of care. Any claims pertaining to insufficiency of the medical care provided may only be considered as a potential violation of state tort law or at most, ordinary negligence or medical malpractice. *See Morris v. City of Alvin, Tex., 950 F.Supp. 804, 806-07 (S.D.Tex. 1997).*

We note that courts which have reviewed medical malpractice claims under the *Eighth Amendment* have recognized that the mere inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently [**19] harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment. The United States Supreme Court and many of the federal courts of appeals are in agreement with this determination. All agree that mere allegations of malpractice do not state a claim, and while their terminology regarding what is sufficient varies, their results are not inconsistent with the standard of deliberate indifference.

Estelle, 429 U.S. at 105-06, 97 S.Ct. at 292. See Page v. Sharpe, 487 F.2d 567, 569 (1st Cir. 1973); Williams v. Vincent, 508 F.2d 541, 544 (2d Cir.1974) (uses the phrase "deliberate indifference"); *Gittlemacker v. Prasse, 428 F.2d 1, 6 (3rd Cir. 1970); Russell v. Sheffer, 528 F.2d 318 (4th Cir. 1975); Newman v. Alabama, 503 F.2d 1320, 1330 n.14 (5th [*866] Cir. 1974), cert. denied, 421 U.S. 948, 95 S. Ct. 1680, 44 L. Ed. 2d 102 (1975)* ("callous indifference"); *Westlake v. Lucas, 537 F.2d 857, 860 (6th Cir. 1976)* ("deliberate indifference"); *Thomas v. Pate, 493 F.2d 151, 158 (7th Cir. 1974); [**20] Wilbron v. Hutto, 509 F.2d 621, 622 (8th Cir. 1975)* ("deliberate indifference"); *Tolbert v. Eyman, 434 F.2d 625, 626 (9th Cir. 1970); Dewell v. Lawson, 489 F.2d 877, 881-82 (10th Cir. 1974).*

Appellees argued that the conduct or lack of action of several jail personnel establishes a showing of deliberate indifference to the needs of Dr. Miranda such as to create liability under the Texas Tort Claims Act. Appellees also included a long list of alleged unconstitutional acts ostensibly establishing the unconstitutional "custom, policy and usage" on the part of the County but which are, in substance, related to the medical treatment provided to Dr. Miranda while in the jail.

A plaintiff may establish municipal liability under section 1983 by proving a violation of constitutional rights by an action pursuant to official municipal policy or pursuant to misconduct so pervasive among non-policy-making employees of the municipality as to constitute a custom or usage with the force of law. *Monell, 436 U.S. at 691, 98 S.Ct. at 2036.* Official policy is (1) a policy statement, ordinance, regulation, or decision that is officially [**21] adopted and promulgated by the law-making officers or by an official to whom the lawmakers have delegated policy-making authority; or (2) a persistent, widespread practice of officials or employees, which, although not authorized by officially adopted and

promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. *Webster, 735 F.2d at 841*. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority, and actions of officers or employees do not create liability unless they execute official policy. *Id.* Official policy involves a deliberate choice to follow a course of action made from among various alternatives by an official who is determined by state law to have the final authority to establish governmental policy. *Jane Doe A v. Special Sch. Dist. of St. Louis County*, 901 F.2d 642, 645 (8th Cir. 1990). Alternatively, "custom or usage" is demonstrated by (1) the existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental [**22] entity's employees; (2) deliberate indifference to or tacit authorization of such conduct by the governmental entity's policymaking officials after notice to the officials of that misconduct; and (3) the plaintiff's injury by acts pursuant to the governmental entity's custom. Id. at 646.

Deliberate Indifference

The standard of deliberate indifference is high. *Alton v. Texas A & M University, 168 F.3d 196, 201 (5th Cir. 1999) (citing Doe v. Dallas Indep. Sch. Dist., 153 F.3d 211, 218 (5th Cir.1998))*. Actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference and do not divest officials of qualified immunity. Id. To demonstrate deliberate indifference a plaintiff must show (1) a grave risk of harm, (2) the defendant's actual or constructive knowledge of that risk, and (3) his or her failure to take easily available measures to address the risk. *Camilo-Robles v. Hoyos, 151 F.3d 1, 7 (1st Cir. 1998), cert. denied, Hoyos v. Camilo-Robles, 525 U.S. 1105, 119 S.Ct. 872, 142 L.Ed.2d 773 (1999)* (citing *Manarite v. City of Springfield,*

*957 F.2d 953, 956 [**23] [*867] (1st Cir.), cert. denied, 506 U.S. 837, 113 S.Ct. 113, 121 L.Ed.2d 70 (1992)).*

EPCDF's policies provided for numerous opportunities for Dr. Miranda to receive medical care or treatment while an inmate in its facility. During the booking procedure, any inmate that revealed a serious medical condition was to be interviewed by a member of the medical staff. Dr. Miranda, however, did not accurately describe his medical condition nor his need for or dependence upon medication. When a need for medication was brought to the attention of jail personnel, Dr. Miranda was taken to the jail clinic and interviewed. Dr. Miranda, however, presented an inaccurate description of his medical history and previous use of the medication Ativan. Based upon Dr. Miranda's representations, the nurse on duty contacted Dr. Block who prescribed two milligrams of Ativan. Dr. Miranda received the Ativan on that day.

For some reason not reflected in the record, Dr. Miranda did not respond to the medication call out on Sunday night and did not receive his Ativan. We agree with Appellant that the fact that the nurse on duty called Dr. Miranda's name twice and, when he did not respond, did not [**24] do anything further to insure that he received his medication, does not rise to the level of an unconstitutional custom, policy or practice. At most, the failure on the part of the nurse on duty to be more persistent in the pursuit of an inmate to insure that the inmate receives his or her medication is ordinary negligence.

As stated previously, to obtain relief pursuant to *42 U.S.C. § 1983*, a plaintiff must prove two elements: (1) a deprivation of a right secured by the Constitution and laws of the United States, and (2) a deprivation of that right by the defendant acting under color of state law. *West v. Atkins, 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 155, 98 S.Ct. 1729, 56 L.Ed.2d 185*

(1978). A prison official's deliberate indifference to a prisoner's serious medical needs violates the *Eighth Amendment. Estelle*, 429 U.S. at 104, 97 S.Ct. at 291. The appropriate test for deliberate indifference is subjective recklessness, as used in the criminal-law sense. *Farmer, 511 U.S. at 838-40*. The legal conclusion of deliberate indifference [**25] must rest on facts clearly evincing wanton actions on the part of [*868] defendants. *Johnson v. Treen, 759 F.2d 1236, 1237 (5th Cir. 1985)*. Evidence of sick call requests, examinations, diagnoses and medications may rebut an inmate's claim of deliberate indifference. *Banuelos v. McFarland, 41 F.3d 232, 235 (5th Cir. 1995). See Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991); Mendoza v. Lynaugh, 989 F.2d 191, 195 (5th Cir. 1993)*. An inmate's disagreement with the kind of medical treatment that he has received is insufficient as a matter of law to state an Eighth Amendment violation. *Norton v. Dimazana, 122 F.3d 286, 291 (5th Cir. 1997)*; *Young v. Gray, 560 F.2d 201, 201 (5th Cir. 1977)*. Federal courts will not inquire into the adequacy or sufficiency of medical care of state inmates unless prison officials appear to have abused the broad discretion which they possess in this area. *Haskew v. Wainwright, 429 F.2d 525, 526 (5th Cir. 1970); Parks v. Johnson County, 2001 U.S. Dist. LEXIS 14774, No. 3:01-CV-1120-P, 2001 WL 1143275, at *1 (N.D.Tex. Sept. 18, 2001)*.

Although Appellees claim [**26] that Dr. Miranda needed additional or different treatment, such claims do not give rise to a cause of action under *42 U.S.C. § 1983. See, e.g., Walker v. Butler, 967 F.2d 176, 178 (5th Cir. 1992)* (holding that a medic's decision to make an inmate walk to the hospital was not deliberately indifferent even though a later diagnosis revealed a broken ankle). Appellees' allegations address the nature and timing of the treatment Dr. Miranda received, rather than any failure on the part of the County to provide medical

care. According to Appellees' allegations, the medical staff of the EPCDF may have been negligent in their treatment of Dr. Miranda but Appellees fail to state a claim against any person for deliberate indifference to his serious medical needs. *See Parks, 2001 U.S. Dist. LEXIS 14774, 2001 WL 1143275, at * 2.*

We must also consider whether the alleged unconstitutional conduct is directly attributable to El Paso County through official action or imprimatur. In other words, liability arises if a deprivation of constitutional rights was inflicted pursuant to acts which the municipality has officially sanctioned or ordered. *Pembaur, 475 U.S. at 480, 106 S.Ct. at 1298.* [**27] This analysis requires a determination of (1) a policymaker; (2) an official policy; and (3) a violation of constitutional rights whose moving force was the policy or custom. These elements distinguish individual violations by employees from those of the governmental entity. *Piotrowski v. City of Houston, 237 F.3d 567, 578 (5th Cir. 2001).* The line between official policy and independent action of employees is often elusive. *McMillian v. Johnson, 88 F.3d 1573, 1577 (11th Cir. 1996).*

Supervisory officials and governmental entities such as cities and counties cannot be held vicariously liable for their subordinates' or employees' actions under *section 1983. See Monell, 436 U.S. at 691-95, 98 S.Ct. at 2036-38; Bigford v. Taylor, 834 F.2d 1213, 1220 (5th Cir.), cert. denied, 488 U.S. 851, 109 S.Ct. 135, 102 L.Ed.2d 108 (1988); Thibodeaux v. Arceneaux, 768 F.2d 737, 739 (5th Cir. 1985)* (per curiam). Supervisory officials may be held liable only if they (1) affirmatively participate in acts that cause constitutional deprivation, or (2) implement unconstitutional policies that causally [**28] result in plaintiff's injury. *See Thompkins v. Belt, 828 F.2d 298, 303 (5th Cir. 1987); see also Grandstaff v. City of Borger, 767 F.2d 161, 169-70 (5th Cir. 1985), cert.*

denied, 480 U.S. 916, 107 S.Ct. 1369, 94 L.Ed.2d 686 (1987). See also Parks, 2001 U.S. Dist. LEXIS 14774, 2001 WL 1143275, at 3.

Policymaker

State law determines whether a particular official has final policy-making [*869] authority. *Praprotnik, 485 U.S. at 123, 108 S.Ct. at 924.* We must look to state and local law, as well as custom and usage having the force of law. *Id. at 125 n.1, 108 S.Ct. at 925 n.1.* Identifying final policymakers may be a difficult task, but state law always should direct us "to some official or body that has the responsibility for making law or setting policy in any given area of a local government's business." *Id. at 125, 108 S.Ct. at 925.* We may not assume that final policy-making authority lies in some entity other than that in which state law places it. *Id. at 126, 108 S.Ct. at 925.* To the contrary, we must respect state and local allocation of policy-making authority. *Id. at 131, 108 S.Ct. at 928.* [**29]

Two more principles guide our inquiry. First, "the authority to make municipal policy is necessarily the authority to make final policy." *Id. at 127, 108 S.Ct. at 926.* Second, the alleged policymaker must have final policy-making authority with respect to the action alleged to have caused the particular constitutional or statutory violation. *Id. at 123, 108 S.Ct. at 924; Jett, 491 U.S. at 737, 109 S.Ct. at 2724.* An official or entity may be a final policymaker with respect to some actions but not others. *See Pembaur, 475 U.S. at 484 n.12, 106 S.Ct. at 1300 n.12.* With respect to a particular action, more than one official or body may be a final policymaker. In other words, final policy-making authority may be shared. *Praprotnik, 485 U.S. at 126, 108 S.Ct. at 925.*

Our search for those responsible for setting EPCDF policy leads us to a review of state law. The Texas Local Government Code provides that "the sheriff of each county is the keeper of

the county jail. The sheriff shall safely keep all prisoners committed to the jail by a lawful authority, subject to an order of the proper court." *TEX. LOC. GOV'T CODE ANN. § 351.041(a)* [**30] (Vernon 1999).

A county cannot be held liable solely because it employs a tortfeasor. *See Monell, 436 U.S. at 691, 98 S.Ct. at 2036.* Rather, only when the execution of a county's policies or its customs deprives an individual of constitutional or federal rights, does liability under *section 1983* result. *See id. at 694, 98 S.Ct. at 2037-38.* The sheriff is without question the county's final policymaker in the area of law enforcement. Thus, a governmental entity like El Paso County can be held accountable for the illegal or unconstitutional actions of the Sheriff of El Paso County. He clearly set the goals for the County and determined how those goals would be achieved. *See Colle v. Brazos County, Tex., 981 F.2d 237, 244 (5th Cir. 1993).*

Plaintiffs' detailed Sixth Amended Petition identifies a long list of complaints regarding the conduct of EPCDF employees and the medical personnel assigned to the jail. The allegations, taken as a whole however, do not complain of a policy that establishes unconstitutional treatment of the decedent and, at most, amount to a series of specific complaints of negligence. An official policy is "[a] [**31] policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority." *Webster, 735 F.2d at 841.* A plaintiff may not infer a policy merely because harm resulted from [*870] some interaction with a governmental entity. *See City of Oklahoma City v. Tuttle, 471 U.S. 808, 820-24, 105 S.Ct. 2427, 2434-37, 85 L.Ed.2d 791 (1985)* (holding as improper jury instructions that permitted jurors to infer the existence of improper policies from a single unconstitutional

act). For example, even though an arresting police officer uses excessive force, it does not necessarily follow that the city adopted a policy endorsing such acts. *Cf. id.* Nevertheless, if a policy exists and is violated to cause a constitutional violation, a single application of that policy can result in liability. *Id. at 822, 105 S.Ct. at 2435-36.*

In this case, we need find no evidence that any of the conduct complained about reflects the deliberately indifferent decision of a policymaker for the County of El Paso which results in an [**32] official custom, policy or practice that violates the constitutional rights of the pretrial detainee, like Dr. Miranda, because of that policy.

As held in the case of *Rhyne v. Henderson County*:

> A municipal "policy" must be a deliberate and conscious choice by a municipality's policy-maker. While the municipal policy-maker's failure to adopt a precaution can be the basis for *§ 1983* liability, such omission must amount to an intentional choice, not merely an unintentionally negligent oversight. *Rhyne v. Henderson County, 973 F.2d 386, 392 (5th Cir. 1992)* (citations omitted).

The Supreme Court has held that municipal failure to adopt a policy does not constitute such an intentional choice unless it can be said to have been "deliberately indifferent." *City of Canton Ohio v. Harris, 489 U.S. 378, 390, 109 S.Ct. 1197, 1205, 103 L.Ed.2d 412 (1989).* A failure to adopt a policy can be deliberately indifferent when it is obvious that the likely consequences of not adopting a policy will be deprivation of rights. *Rhyne, 973 F.2d at 392.*

As *Rhyne* holds, the ultimate jury question in this case is whether El Paso County [**33] adopted policies creating an obvious risk that pretrial detainees' constitutional rights would

be violated. The facts pleaded by Appellees do not support an inference that unconstitutional County policies were the "moving force" behind the situation that led to Dr. Miranda's death, the facts as presently pleaded and proved at trial show only that the possibility of negligence regarding the medical care provided to Dr. Miranda exists. *Monell, 436 U.S. at 691, 98 S.Ct. at 2036*; *Colle v. Brazos County, Tex., 981 F.2d 237, 244-46 (5th Cir. 1993)*.

Though we believe that the conduct of Dr. Harold Block arguably was negligent, it amounts to, at most, medical negligence with regard to his treatment of Dr. Miranda. Nothing in the record shows his conduct rises to the level of deliberate indifference contemplated by the constitutional limitations under the *Fourteenth Amendment*. Further, Appellees present little evidence that suggests that Dr. Harold Block was the policymaker for the El Paso County Detention Facility. Appellees had the burden of establishing that the policymaker was other than the Sheriff for the County of El Paso and they failed to meet that [**34] burden. We agree that Texas state law provides that the Sheriff of each county is the keeper of the county jail and recognize that the Sheriff is the policymaker for the jail.

Appellees cite the contract between the County and Dr. Block as evidence that Dr. Block was the policymaker for the jail with regard to medical treatment provided to [*871] inmates. When reviewing the contract, we note that the document includes several paragraphs describing the duties of the Medical Director:

> The MEDICAL DIRECTOR agrees to the following:
>
> 1. CONDUCT-The MEDICAL DIRECTOR agrees to be bound by the rules applicable to the El Paso County Detention Facility as set out in the Texas

Commission on Jail Standards while performing the services for the El Paso County Detention Facility.

. . .

THE MEDICAL DIRECTOR AGREES TO:

A. Report to the Sheriff or his designated representative.

B. Assist the FACILITY in meeting its duties to inmates as stated in the Policies and Procedures Manual for the FACILITY. He shall also assist in meeting such duties as may be imposed by Federal and State Laws and Regulations.

C. Assist the FACILITY in developing and implementing policies [**35] that will assure high quality medical and nursing care. He shall also provide and set specific protocols, policies and procedures concerning the following:

1. Emergency treatment of inmates;

2. Prescription medicines;

3. Special diets; and

4. Procedure for routine care of inmates.

D. Approve and supervise all medical procedures conducted in the FACILITY including the following;

. . .

1. Receiving screening procedures;

. . .

3. Referrals of seriously ill inmates;

4. Provision of non-emergency medical services;

5. Obtaining emergency medical and dental services;

. . .

11. Detoxification;

. . .

13. Policy concerning medication administration;

. . .

15. The work of qualified medical personnel;

16. Deciding the emergency nature of illness or injury;

. . .

IT IS FURTHER AGREED THAT:

A. No regulation of the FACILITY shall involve the MEDICAL DIRECTOR in any aspect of the correctional or disciplinary procedures which is not related to genuine medical concerns, or which would unduly restrict or compromise the medical judgement of the MEDICAL DIRECTOR. [**36]

B. In situations requiring emergency medical care, custody procedures shall yield to the medical needs of the inmates as determined by the MEDICAL DIRECTOR. The process of moving inmates to a facility appropriate to his health needs shall not be unreasonably slowed by the clearance procedures.

We read the contract as establishing that the Medical Director is authorized to provide medical care to the inmates housed in the EPCDF but the Medical Director must ultimately answer to the Sheriff with regard to overall jail policies. Clearly, the Medical Director is expected to assist the Facility in developing and implementing policies that will assure high quality medical and nursing care. The Medical Director must, however, report directly to the Sheriff. Most important, we recognize that under Texas law, only an [*872] individual licensed as a physician by the state may practice medicine in

the state. In providing for the availability of medical care for Dr. Miranda, the Sheriff established the policy under which Dr. Block was contracted with to practice medicine and provide medical care to the inmates, but ultimately, the Sheriff was the policymaker for the jail. The contract reflects [**37] a need for overall control of the jail and establishment of general policies and procedures balanced by the need for medical care of the inmates. Nothing presented by the Appellees suggests that a County policy to deny inmates medication or medical care exists. Further, there is no evidence in the record that suggests that any policy of the County provides that any patient suffering from a seizure disorder is deliberately denied medication and indifferently provided medical care. To the contrary, the evidence submitted establishes that medical care was provided to Dr. Miranda in a timely manner. Any of the arguments presented by Appellees regarding any of the specific actions of negligence related to the treatment provided to Dr. Miranda amount to no more than medical malpractice or ordinary negligence on the part of Dr. Block. Dr. Block's authority was limited to providing medical care to the inmates.

We also note that the Appellees' Sixth Amended Petition contains a lengthy list of complaints that meld Appellees' allegations about the treatment of Dr. Miranda into a series of complaints based on negligence which Appellees contend establishes a custom, policy or practice of constitutional [**38] dimension. It is tragic that Dr. Miranda lost his life while incarcerated in the EPCDF but the evidence presented and the pleadings as filed do not establish that the acts of Dr. Block amount to more than medical negligence. As such, they have failed to establish a constitutional violation by an individual acting under color of state law.

V. FAILURE TO TRAIN

Appellees have also argued that the Defendants were liable for failing to train EPCDF personnel by the County's "failing to train jail personnel and medical personnel how to identify and properly assess and treat seizure patients, especially in light of the voluminous number of seizures in the jail."

To succeed on a failure-to-train claim, a plaintiff must establish (1) inadequate training procedures, (2) that inadequate training procedures caused the injury, and (3) deliberate indifference of municipal policymakers. *Pineda v. City of Houston, 291 F.3d 325, 332 (5th Cir. 2002)*. The evidence submitted by Appellees [*873] with respect to EPCDF personnel's responses to the seizure Dr. Miranda suffered while in EPCDF custody did not establish that a lack of training contributed to his injuries. None of the evidence [**39] presented reflects a custom, policy or practice of exhibiting deliberate indifference with regard to the response of jail personnel to individuals suffering from seizures. To the contrary, the evidence reflects that Dr. Miranda was promptly attended to upon discovery of his seizure and immediately provided with medical attention. It is a tragedy that he did not survive, but medical treatment was not denied to him. *See Garcia v. County of El Paso, 79 Fed. Appx. 667, No. 02-51408, 2003 WL 22477700, at *2 (5th Cir. Oct. 31, 2003).*

For that reason, we sustain Appellant's Issue One, reverse the judgment of the trial court, and render a take-nothing judgment in favor of Appellant. Because this issue disposes of the case, we do not reach Appellant's remaining Issues Two through Six.

VI. COSTS

Following the issuance of our original opinion and judgment, which provided only for the recovery of the County's costs of appeal, the County filed a motion to recover costs in the trial court in the amount of $ 4,972.63 and it supported that request by attaching several invoices to the motion. The County also seeks recovery of $ 15,544.39 as the costs on appeal. Appellees object to the [**40] motion on several grounds including that the County is not entitled to recover all of the costs identified in the motion and that the amount of the costs on appeal and in the trial court should be tabulated by the clerks of the respective courts.

Costs, within the meaning of *Rules 125 through 149 of the Rules of Civil Procedure and Rule 43.4 of the Rules of Appellate Procedure*, are those items in the clerk's bill of costs. *Pitts v. Dallas County Bail Bond Board, 23 S.W.3d 407, 417 (Tex. App.--Amarillo 2000, pet. denied)*. As a general matter, courts dictate which party is entitled to collect costs and the inclusion of specific items taxed as costs is a ministerial duty performed by the clerk. Id. We agree with Appellees that when responding to a request for an award of costs, a court's role is to determine which party is to bear the costs of court, not to adjudicate the correctness of specific items. *See id., citing Operation Rescue-National v. Planned Parenthood of Houston and Southeast Texas, Inc., 937 S.W.2d 60, 87 (Tex. App.--Houston [14th Dist.] 1996), modified in Operation Rescue, 975 S.W.2d 546, 41 Tex. Sup. Ct. J. 1071 (Tex. 1998); [**41] Reaugh v. McCollum Exploration Co., 140 Tex. 322, 167 S.W.2d 727, 728 (1943)*. Correction of errors in specific items of costs is sought by a motion to re-tax costs. *Id.*; *Reaugh, 167 S.W.2d at 728*. Such a motion should be filed in the court where the item of costs accrued. *Reaugh, 167 S.W.2d at 728*.

Accordingly, we grant the County's motion to recover costs but only to the extent that we award recovery of both the costs of appeal and in the court below. We deny the portion of the motion which asks for recovery of a specified amount of costs on appeal or in the trial court. When our mandate issues, the costs of appeal will be determined in the usual manner by the clerk of the court and a bill of costs will be attached to the mandate. *See TEX. R. APP. P. 18.5, 43.4.* If a party believes that the bill of costs is erroneous, the Court will entertain a motion to re-tax the appellate costs. Likewise, if a party believes that the clerk of the trial court has not accurately determined the trial court costs pursuant to Texas Rule of Civil Procedure 131, the appropriate [**42] remedy is to file a [*874] motion in the trial court to re-tax those costs.

RICHARD BARAJAS, Chief Justice

APPENDIX B

SUPREME COURT OF TEXAS

Jessie Dorado, Individually and as Mother and next Friend of Brianna Elexis Miranda, a Minor and on Behalf of the Estate of Eduardo Miranda, Deceased,

v.

The County of El Paso.

RE: Case No. 06-0148

COA #: 08-03-00421-CV
TC#: 97-2506
May 5, 2006

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

APPENDIX C

SUPREME COURT OF TEXAS

Jessie Dorado, Individually and as Mother and next Friend of Brianna Elexis Miranda, a Minor and on Behalf of the Estate of Eduardo Miranda Deceased,

v.

The County of El Paso.

RE: Case No. 06-0148

COA #: 08-03-00421-CV
TC#: 97-2506
June 23, 2006

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced case.